U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

Date Issued: March 8, 2000
Case No.: 1999 INA 264

In the Matter of:

METROPOLITAN IMPORTS, INC., Employer,

on behalf of

RIAD I. A. IBRAHIM, Alien.

Appearance: Michael Hadeed, Jr., Esq., of Springfield, Virginia, for the Employer and Alien.
Certifying Officer: R. E. Panati, Region III.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of RIAD I. A. IBRAHIM ("Alien") by METROPOLITAN IMPORTS, INC., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On January 12, 1998, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Export Economist" in its Auto Sales business. AF 44. The position was classified as "Economist" under DOT No. 080.062-010.[3] The duties of the Job to be Performed were the following:

> Plan, design, and conduct research to aid in interpretation of economic relationships and in solution of problems arising from export of domestic vehicles and merchandise to the Middle East countries. Devise methods and procedures for identification of prospective corporate and individual clients in prospective markets. Compile data, review and analyze financial data, organize data into report format. Formulate recommendations and policies to aid in market interpretation and solution of export problems, and to reduce risk exposure.

AF 44, box 13. No "Other Special Requirements" were stated. Id., box 15. No educational preparation was specified, but the Employer required eight years of experience in the Job Offered or eight years of years of experience in the Related Occupation of Banking. The work week consisted of forty hours per week of regular time from 9:00 a.m., to 6:00 p.m., on days that were not specified, with no provision for overtime. The wage rate offered was $21.12 per hour. *Id.*,

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]050.067-010, **ECONOMIST** (profess. & Kin.) alternate titles: economic analyst. Plans, designs, and conducts research to aid in interpre-tation of economic relationships and in solution of problems arising from production and distribution of goods and services: Studies economic and statistical data in area of specialization, such as finance, labor, or agriculture. Devises methods and procedures for collecting and processing data, utilizing knowledge of available sources of data and various econometric and sampling techniques. Compiles data relating to research area, such as employment, productivity, and wages and hours. Reviews and analyzes economic data in order to prepare reports detailing results of investigation, and to stay abreast of economic changes. Organizes data into report format and arranges for preparation of graphic illustrations of research findings. Formulates recommen-dations, policies, or plans to aid in market interpretation or solution of economic problems, such as recommending changes in methods of agricultural financing, domestic and international monetary policies, or policies that regulate investment and transfer of capital. May supervise and assign work to staff. May testify at regulatory or legislative hearings to present recommendations. May specialize in specific economic area or commodity and be designated Agricultural Economist (profess. & kin.); Commodity-Industry Analyst; (profess. & kin.); Financial Economist (profess. & kin.); Industrial Economist (profess. & kin.); International-Trade Economist (profess. & kin.); Labor Economist (profess. & kin.); Price Economist (profess. & kin.); Tax Economist (profess. & kin.). *GOE: 11.03.05 STRENGTH: S GED: R5 M5 L5 SVP: 8 DLU: 81*

boxes 10-12, 14-15.[4] Although twelve apparently qualified U. S. workers applied, the Employer did not hire any of the U. S. applicants for the Job Offered. AF 51-55.

Notice of Findings. On March 11, 1999, the Notice of Findings ("NOF") denied certification, subject to Employer's rebuttal. AF 34-37. First, the NOF said that Employer's wage offer was below the prevailing wage in violation of 20 CFR §§ 656.20(c)(2), 656.20(g), 656.21(g)(4) and 656.40(a)(1), and the Employer was directed to file evidence addressed to the prevailing wage issue. Second, the NOF found the application in violation of 20 CFR § 656.21(b)(2), as the Employer's hiring requirements were unduly restrictive in that it specified eight years of work experience in the Job Offered or eight years in banking as the qualifying qualifications for the position. The NOF said

> It is unduly restrictive to limit your educational, training and/or experience requirements to one specific area if there are other fields of study and/or experience which would qualify someone for your position. If you stated that 8 years of experience in the job offered or in banking would qualify someone for your position, then you are, in fact, stating that only this education, training, and/or experience is acceptable and necessary/required in order to satisfactorily perform the duties of your job. There is no evidence that only these requirements are necessary to perform the described job duties and causes otherwise qualified U. S. applicants to be screened out.

AF 36. Employer was directed to establish that this job requirement was common to the postion. In the alternative, the NOF instructed the Employer either to delete the unduly restrictive requirement or to file evidence clearly establishing that the job requirement bore a reasonable relationship to this occupation in the context of its business and was essential to performing the job duties in a reasonable manner.

---

[4]The Alien was born 1942 A national of Jordan, he was living and working in the United States under an H-1B visa at the time of application. The H-1B visa is issued to non-immigrant temporary workers who are qualified to perform services in specialty occupations, largely professions. See Act §§ 101(a)(15)(H), 212(m), 212(n), 214(g), (h) and (i). See 8 CFR §§ 214.2(h)(4)(ii) and 214.2(h)(4)(iii), as amended, 55 Fed. Reg. 2,623 (Jan. 26, 1990), and renumbered, 55 Fed. Reg. 34,895, 34, 897 (Aug. 27, 1990). Also see H.R. Rep. Noi.. 723, 101st Cong., 2d Sess. 67 (1990) reprinted in 1990 U.S. Code Cong. & Admin. News 6710. The Alien earned a degree of Bachelor of Arts in English Literature in Syria in 1974. From Februay 1961 to August 19657 the Alien was an accountant in a bank in Jordan. From September 1967 to September 1968 he was an accountant for a money changer in Jordan. From October 1968 to October 1970 the Alien worked in the discounted bills department of a bank in Jordan. From October 1970 to August 1974 he was head of accounts department in a money changer business in Jordan. From June 1975 to September 1981 he was financial officer/treasury controller in Riyad Bank in Saudi Arabia. From January 1978 to June 1981 he also worked part-time as chief accountant/financial advisor in "Abar & Zeini, U.S. Beef," a firm he said was in the banking and finance business in Saudi Arabia. From October 1981 to August 1990 he was financial officer/head of departments in Arabian Investment Bank in Jordan. From February 1991 to June 1997 the Alien was part-time bookeeper in a retail business in Virginia. From March 1994 to January 1995 the Alien was a part-time salesman in a printing and publishing business in Virginia. From December 1994 to the date of application the Alien was part-time accountant in a sales business in Springfield, Virginia. From May 1995 to April 1997 he was a part-time bookeeper in a retail furniture business. From August 1996 to the date of application he was a part time bookeeper in a furniture business. Although the locations of some of these businesses were not given, the Panel assumes that they are in the vicinity of Springfield, Virginia.

Finally, Mr. Eloseily, Mr. Nkem, and Mr. Obike were rejected for reasons that the NOF said were neither lawful nor job-related in violation of 20 CFR §§ 656.20(c)(8) and 656.21(b)(6). The NOF explained that these three U. S. applicants, who were apparently qualified for the job offered, were rejected by the Employer on grounds that they did not have eight years of experience either in the Job Offered or in banking. The NOF explained that an employer may not use as a lawful job-related reason for rejecting U.S. workers a requirement which is not normally required for the performance of the job and/or has not been proven to be a business necessity. The NOF said that each of these U. S. workers could perform the job duties under 20 CFR §§ 656.20(c)(2), 656.20(g).[5]

Rebuttal. On April 15, 19998, the Employer filed its rebuttal, which included a cover from its attorney, a letter by the Employer, several pages from "A Business Guide to Saudi Arabia," and statements by Hikamt Beani and Jamil Beani on the need for eight years of experience as an economist and/or banker in the Middle East, and a survey of three motor vehicle exporters to the Middle East. Employer's evidence was offered as proof that eight years of work experience is a reasonable requrement in the context of trading with the Middle East. AF 07-33.

Final Determination. In the June 17, 1999, Final Determination, the CO denied certification. The CO accepted the Employer's rebuttal of the NOF findings that its experience requirement was unduly restrictive and that it unlawfully rejected two qualified U. S. workers. The CO denied certification on grounds that the Employer did not rebut the finding that it failed to offer the prevailing wage. .

Appeal. On July 12, 1999, the Employer requested administrative judicial review by BALCA. Employer contended that it had offered 95% of the prevailing hourly wage rate, based on the Prevailing Wage Determination, arguing that the amount it actually offered was $21.12, and that amount stated in the Prevailing Wage Determination was $21.14, and that the two cent deviation was *de minimis*.

DISCUSSION

The Secretary of Labor expressly provided the process to be followed by the U. S. Department of Labor in determining the prevailing wage for labor certification purposes by adopting 20 CFR § 656.40(a), which provides,

---

[5]Mr. Eloseily had a bachelor's and a master's degree in Economics, which combine to equal at least four years of education experience, plus more than six years of work as a banker, a total of not less than ten years of education and work experience. AF 41-42. Mr. Obike had six academic degrees, includeing a bachelor's degree, a master's degree and a doctorate in Business Administration, Economics, and Banking and Finance. In addition he was a Certified Public Accountant and was a vice president/comptroller and a general manager in two different banks from 1978 through 1981, and was chief finance officer for a manufacturing and exporting firm from 1982 through 1986. From 1987 to the date of application he worked as a CPA, chief executive officer, and was managing director of a major international accounting and consulting firm. AF 43.

> (a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by §656.21(b)(3), shall be determined as follows:(1) If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. ...

Because certification of alien workers is an exception to the general exclusion of immigrants, the Panel is required to construe its provisions strictly, and it must resolve all doubts against the party invoking this exemption from the general operation of the Act. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen,** 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). Consequently, in all proceedings under the Act and regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification. It follows that the CO's findings of law and fact will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). It is germane to the NOF issues in this case that Congress enacted § 212(A)(14) of the Immigration and Nationality Act of 1952 (as amended by § 212(a)(5)(a) of the Immigration Act of 1990 and recodified at 8 U.S. C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d 211, 213 (9th Cir., 1979).[6]

In the NOF the CO found that the Employer's hourly wage offer of $21.12 was more than ninety-five per cent below the prevailing wage of $22.25. 20 CFR § 656.40(a)(1). The NOF notified the Employer that it could rebut this finding by increasing the hourly wage to the level of the prevailing rate or by submitting countervailing evidence that the prevailing wage determination was in error. AF 35. Employer's rebuttal expressly addressed this issue, arguing that the wage offered was within five per cent of the prevailing wage. AF 09. The Final Determination rejected this argument, concluding that such a five per cent differential would lower the hourly rate to $21.12 per hour and that Employer had not corrected this violation. As a consequence, the CO denied alien labor certification.

---

[6] The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended to palce the burden of proof in an application for labor certification on the employer seeking an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334. To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Pursuant to the favored treatment Congress legislated for the limited class of alien workers whose skills were needed in the U. S. labor market, 20 CFR § 656.2(b) assigned the burden of proof in an application for alien labor certification under this exception to the general exclusion of aliens under the Act. This regulation quoted and relied on § 291 of the Act (8 U.S.C. § 1361), which provided, "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."

The Panel finds that the Employer did not question the amount of the prevailing wage in its rebuttal, and that it offered no evidence challenging the prevailing wage determination. **Sun Valley Co.**, 90 INA 391 and 90 INA 393 (Jan. 6, 1992). As 20 CFR § 656.25(e) provides that the employer's rebuttal evidence must traverse all of the deficiencies stated in the Notice of Finding, the Board has definitively held that all findings that are not rebutted are deemed admitted. **Belha Corp.**, 88 INA 024 (May 5, 1989)(*en banc*); **Boris Shmulevich**, 95 INA 019 (Aug. 16, 1996); **Anjan S. Sura**, 94 INA 200 (May 30, 1995).[7] Since the Panel finds that the Employer has thus admitted that the CO's prevailing wage rate was correct, the hourly wage rate offered in its Application violated 20 CFR §§ 656.20(c)(2) and 656.40. For this reason, certification must be denied by the CO, regardless of any other issue.

Because the Employer admitted the violation but claimed on appeal that BALCA should mitigate the strict application of the regulation for equitable reasons, the Panel has considered all aspects of this Application to be relevant to the equitable remedy Employer seeks. First, the arithmetic of the computation of the amount of deviation that the Employer was permitted by 20 CFR § 656.40(a)(2)(i) was self-evident. The amount of the permitted five per cent difference was $1.11 per hour, and the Employer's deviation exceeded this amount by two cents, an amount that it characterized as miniscule. It argued on appeal, however, that, "While the employer is willing to raise the prevailing wage, a request to advertise would cause needless delay in certifying this application." Employer concluded that its deviation "does not constitute an adverse effect and did not prejudice the properly placed advertisement." AF 01-02.

While it admitted the amount of the prevailing wage that these regulations required it to pay the worker it hired for the Job Offered, Employer maintained, even on appeal, that it should not be required to readvertise the position at the full amount of the correct hourly rate. As no such option was mentioned in the Final Determination, and this argument addressed to the "adverse effect" is untimely and irrelevant. Addressing Employer's *de minimis* argument, the Panel agrfees that, the difference between the prevailing wage and the hourly rate Employer offered was small, and the Employer's deficiency of two cents below ninety-five percent of the prevailing wage was miniscule. This argument cuts both ways, however. If Employer's assertions as to the importance of this position are credible, the Job Offered was necessary to the success of its business operation, i which the Employer said it planned to implement an "ambitious business strategy to multiply its auto sales export to the Middle East," adding that the "challenges involved in penetrating the Middle East Market," which it described as "difficult." AF 08.

Based on the Employer's rebuttal representations and appellate arguments, its election to offer an amount that was more than $1.11 below the prevailing hourly wage and under two cents

---

[7] In **Reliable Mortgage Consultants**, 92 INA 321 (Aug. 4, 1993), the Board held that the employer's failure to address a deficiency noted in the NOF supported the denial of labor certification where a CO found that the employer had failed to answer the NOF finding that it had failed to offer the prevailing wage.

below the deviation permitted by 20 CFR §§ 656.20(c)(2) and 656.40(a)(2)(i) is found to be an unrepentant, conscious violation of the Act and regulations which no equitable relief is self-evident. As the Employer did not present any reason in law or equity to support relief from the strict enforcement of the provisions of the applicable regulations, there are none for the Panel to find. **United States v. Allen,** *supra*. Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification should be and it hereby is Affirmed.

For the panel:

_____

FREDERICK D. NEUSNER

Administrative Law Judge

Concurrence of Judge Huddleston

Judge Huddleston, concurring: I concur in the result reached by the majority. However, I write separately to state that the application should have been denied summarily pursuant to our decision in *Francis Kellogg, et als.*, 94-AINA-465, 94-INA-544, 95-INA-68 (Feb. 2, 1998)(*en banc*). We held in *Kellogg* that where, as here, the alien does not meet the primary job requirement, but only potentially qualified for the job because the employer has chosen to list alternative job requirement, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5).

s/s Richard E. Huddleston

RICHARD E. HUDDLESTON

Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.